

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JAMES A. BATTLE, JR., )  
Plaintiff, ) CASE NO. C10-5410-RSM-MAT  
v. ) ORDER STRIKING PLAINTIFF'S  
DAVID HAYNES, *et al.*, ) MOTIONS TO COMPEL  
Defendants. )  
\_\_\_\_\_  
)

This is a civil rights action brought pursuant to 42 U.S.C. § 1983. This matter comes before the Court at the present time on two motions by plaintiff to compel discovery. Defendants have filed responses to both motions and both motions are now ripe for review. The Court, having reviewed plaintiff's motions, and the balance of the record, does hereby find and ORDER as follows:

(1) Plaintiff's motion to compel responses to his first set of interrogatories and requests for production of documents (Dkt. No. 51) is STRICKEN. Plaintiff seeks to compel defendant Josh Vivet to respond to his first set of interrogatories and requests for production of documents. (Dkt. No. 51.) Defendants, in their response to plaintiff's first motion, request that the motion be denied because plaintiff failed to meet and confer in a good faith effort to

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01 resolve the discovery issue prior filing the motion as required by Rule 37(a)(1) of the Federal  
02 Rules of Civil Procedure.<sup>1</sup> (Dkt. No. 59.)

03 Plaintiff, in his reply brief in support of his first motion to compel, suggests that he  
04 satisfied the Rule 37(a)(1) requirement because he requested a discovery conference in a letter  
05 directed to defendants' counsel on April 1, 2011 which defendants' counsel failed to respond to.  
06 (See Dkt. No. 60.) However, the record makes clear that plaintiff sent the letter to defendants'  
07 counsel *with* his first set of interrogatories and requests for production, and that the purpose of  
08 the requested discovery conference was to establish a discovery plan in accordance with Rule  
09 26(f) of the Federal Rules of Civil Procedure, not to resolve any outstanding discovery dispute.  
10 (See Dkt. No. 52 at 1 and Ex. A.)

11 Plaintiff's April 1, 2011 letter clearly did not satisfy the requirements of Rule 37(a)(1)  
12 and plaintiff's suggestion to the contrary is disingenuous. Plaintiff has litigated actions in this  
13 court in the past and should be well familiar with the prerequisites for filing motions to compel  
14 and with the specific requirements of Rule 37(a)(1). *See Battle v. Haynes, et al.*,  
15 C09-818-RAJ, Dkt. No. 81. Plaintiff will not be permitted to circumvent those requirements.

16 (2) Plaintiff's motion to compel complete answers to his second set of  
17 interrogatories (Dkt. No. 65) is STRICKEN. Plaintiff seeks to compel defendant Vivet to  
18 supply complete answers to five of the interrogatories contained in plaintiff's second set of  
19 interrogatories and requests for production (interrogatory numbers 4, 6, 7, 8, and 11). (*Id.* at  
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21 1 Rule 37(a)(1) of the Federal Rules of Civil Procedure requires that a party seeking to  
22 compel discovery include in the motion a certification that the moving party "has in good faith  
conferred or attempted to confer" with the party failing to make disclosures. *See Fed. R. Civ.*  
P. 37(a)(1).

01 1.) The materials provided by plaintiff in support of his motion reflect that defendant Vivet  
02 objected to each of the five interrogatories as compound, vague and confusing, and then,  
03 pursuant to Fed. R. Civ. P. 33(d), referred plaintiff back to police reports which were provided  
04 to plaintiff in a prior lawsuit. (Dkt. No. 65, Declaration of James Battle, Appendix A.)

05 Defendants, in their response to plaintiff's second motion to compel, request that the  
06 motion be denied because, again, plaintiff failed to meet and confer in a good faith effort to  
07 resolve the discovery issue before filing the motion. (Dkt. No. 66.) Defendants acknowledge  
08 that the parties participated in a telephonic discovery conference on June 21, 2011, but they  
09 assert that plaintiff's motion papers do not reflect any effort by him to actually resolve the  
10 discovery dispute in good faith prior to bringing his motion to compel. (*Id.* at 6.)

11 Defendants have provided the Court with a copy of a letter prepared by defendants'  
12 counsel following the June 21 telephonic conference, and directed to plaintiff, which  
13 memorialized the conference. (Dkt. No. 67, Ex. 2.) Defendants' counsel noted in the letter  
14 that plaintiff had complained during the conference about defendants referring him back to  
15 police reports provided in an earlier lawsuit in response to certain interrogatories.<sup>2</sup> (*Id.*) The  
16 letter indicates that counsel advised plaintiff she had no obligation to duplicate previous  
17 discovery and that plaintiff agreed to go back and review the prior discovery to make sure he  
18 had the reports which were referenced in defendant Vivet's discovery responses. (Dkt. No. 67,  
19 Ex. 2.) The letter also indicates that counsel explained to plaintiff that, pursuant to Rule 33(d)  
20 of the Federal Rules of Civil Procedure, defendants were entitled to refer back to police reports  
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22 2 The previous lawsuit in which the relevant reports were produced was *Battle v. Haynes, et al.*, C09-818-RAJ.

01 in response to some of plaintiff's discovery questions. (*Id.*)

02 Plaintiff, in his reply brief, asserts that he did not agree with defendants' reliance on  
03 Rule 33(d) and that is what prompted him to file his second motion to compel. (*See* Dkt. No.  
04 69.) It is noteworthy, however, that plaintiff makes no reference to the Rule 33(d) issue in his  
05 motion to compel. (*See* Dkt. No. 65) Instead, plaintiff objects in his motion to the fact that  
06 defendant Vivet's answers to the five interrogatories at issue required him to refer back to  
07 discovery provided in another lawsuit and he suggests that any reports relied upon in response  
08 to discovery requests made in this action should be produced in this action, even if they were  
09 previously produced in a separate action. (*See id.* at 3 and 6.) The letter memorializing the  
10 discovery conference indicates that this issue was addressed and apparently resolved. (*See*  
11 Dkt. No. 67, Ex. 2.) If plaintiff was dissatisfied with the manner in which the issue was  
12 resolved, he apparently did not share that fact with defendants' counsel. Thus, in this Court's  
13 view, plaintiff failed to fully comply with Rule 37(a)(1) before filing his second motion to  
14 compel and the motion must therefore be stricken.<sup>3</sup>

15 (3) Plaintiff requests in both of his motions to compel that he be awarded reasonable  
16 costs and fees incurred in bringing his motions.<sup>4</sup> Plaintiff also requests in his second motion  
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18 3 Plaintiff should be aware as he moves forward with discovery that this Court will not  
19 require defendants to produce materials that have already been provided to plaintiff, even if  
20 those materials were provided to plaintiff in a different action. To require such duplication  
21 would be costly and time consuming and would serve no relevant purpose.

22 4 Plaintiff also request in his first motion that the Court enter an order of default based  
on defendants' failure to comply with Rule 26(f) of the Federal Rules of Civil Procedure.  
However, plaintiff appears to now understand that Rule 26(f) does not apply in this case  
because plaintiff is incarcerated and is proceeding *pro se*. *See* Fed. R. Civ. P. 26(a)(1)(B)(iv)  
and Fed. R. Civ. P. 26(f)(1).

01 that sanctions be imposed on defendants because they failed to timely respond to his second set  
02 of interrogatories and requests for production and because they served their responses  
03 improperly.

04 Defendants request in their responses to both motions to compel that monetary  
05 sanctions be imposed against plaintiff for his failure to comply with the requirements of Rule  
06 37(a)(1). Defendants note in their response to plaintiff's first motion to compel that defendant  
07 Vivet's responses to plaintiff's first set of interrogatories and requests for production were, in  
08 fact, timely served on plaintiff and that plaintiff signed, and apparently mailed, his motion to  
09 compel before the thirty day deadline for responding to the discovery requests had even  
10 elapsed. (*Id.*) Defendants further note that plaintiff was previously admonished by the court,  
11 in a separate proceeding, about filing a motion to compel in advance of the date the discovery  
12 was due and prior to trying to confer with opposing counsel. (*Id.*)

13 Defendants note in their response to plaintiff's second motion to compel that the  
14 responses to plaintiff's second set of discovery requests were placed in the mail in a timely  
15 fashion but were not delivered in a timely fashion because of a processing delay by the United  
16 States Postal Service. Defendants further note that after learning of this problem, they  
17 forwarded the discovery responses to plaintiff, via e-mail, through his prison counselor in an  
18 effort to expedite their delivery. The e-mailed responses were sent on June 16, 2011, the same  
19 date the United States Postal Service ultimately delivered the previously mailed discovery  
20 materials to plaintiff.

21 Because both of plaintiff's motions to compel were procedurally deficient, and arguably  
22 unnecessary, plaintiff is not entitled to any costs he may have incurred in preparing these

01 motions. The Court also declines to impose sanctions against defendants as plaintiff fails to  
02 demonstrate that defendants engaged in any misconduct.

03 Defendants make a better case for the imposition of monetary sanctions against plaintiff  
04 given that plaintiff was previously warned by Judge Tsuchida in cause number C09-818-RAJ  
05 about the sort of abusive litigation tactics evident here. However, while the undersigned does  
06 not condone plaintiff's tactics, the Court will at this juncture merely reiterate Judge Tsuchida's  
07 warning that abusive litigation tactics will not be tolerated going forward and that appropriate  
08 sanctions will be imposed if plaintiff continues to engage in vexatious litigation practices. *See*  
09 Local Rule GR 3(d).

10 (4) The Clerk is directed to send copies of this Order to plaintiff, to counsel for  
11 defendants, and to the Honorable Ricardo S. Martinez.

12 DATED this 14th day of July, 2011.

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15 Mary Alice Theiler  
16 United States Magistrate Judge  
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